Supreme Court, U. S.
FILED
JUL 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-52

BOARD OF EDUCATION OF BALTIMORE COUNTY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Board of Education of Baltimore County, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 19, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed is unreported and is printed in Appendix A hereto, infra, page . By its Order dated April 9, 1980, the United States Court of Appeals for the Fourth Circuit denied Petitioner's Petition for Rehearing which is printed in Appendix A hereto, infra, page 5. The prior Opinion of the United States District Court for the District of Maryland dated September 28, 1978, is reported as *Usery v. Board of Education of Baltimore County*, at 462 F. Supp. 535 (D. Md. 1978) and is printed in Appendix A hereto, infra, page 6. The prior Judgment of the United States District Court for the District of Maryland dated October 25, 1978, is printed in Appendix A hereto, infra, page 35.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 19, 1980. On April 9, 1980, the Court of Appeals denied Petitioner's request for a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor should be permitted to maintain an action under the Equal Pay Act to recover back wages where the Department of Labor failed to follow its own administrative policies and procedures in failing to conduct a "final conference" upon conclusion of its investigation and by instituting suit for back wages after voluntary compliance had been achieved.

REGULATIONS INVOLVED

This case involves the effect to be given to §§ 53b01 and 81b03 of the Field Operations Handbook of the Wage and Hour Division of the United States Department of Labor.

The pertinent provisions of the referenced sections are set forth below:

> "53b01 Final Conference (a) The following is a basic outline of the final conference to be conducted upon the completion of the fact finding phase of an investigation; this conference shall be held with the employer or his designated representative.
>
> (1) Inform him of the investigation results.
>
> (2) If violations were found, inform him of the steps necessary to comply and give him any pertinent publications he does not have and which the CO [compliance officer] believes he should have, or those he requests. As appropriate, the CO shall explain the laws involved; this should be done without disturbing practices which are not violative such as payment of OT to employees who may be exempt.
>
> (3) Ascertain the reasons for any violations and obtain an agreement to comply . . .
>
> (5) If within the authority of the CO, negotiate payment of BW [back wages] (except in potential litigation cases as set out in FOH 80a).
>
> (6) If there are any questions which the CO cannot answer, or if for any reason the investigation is being suspended or there will be a delay, the employer should be informed to the extent possible how to correct any known violations and the reasons for the delay . . ."
>
> "81b03 Civil Injunction Policy (a) As a general rule, the Division will use the remedy of an injunction only as a means of securing compliance when voluntary compliance has been refused. Whenever an employer refuses to come into compliance, the investigation shall be prepared for civil action.
>
> (b) If employer, either on his own initiative or as a result of conferences with representatives of the Division or of the Office of the Solicitor, changes his payroll practices so as to come into compliance with the FLSA without the necessity of suit, ordinarily a complaint for civil action will not be filed. This policy

will be followed even though restitution has not been paid, and in child labor cases where no wilfulness is involved. However, an exception to the general rule will be made and suit filed, despite current compliance, if future compliance cannot reasonable be anticipated, because of the nature of the violations, prior investigation history, and so forth."

STATEMENT OF THE CASE

The Secretary of Labor commenced this action on May 7, 1976, to enjoin the Board of Education of Baltimore County from violating the provisions of the Equal Pay Act, 29U.S.C. § 206(d) by paying its custodial workers designated as Custodians II (predominantly females) a lower wage than its custodial workers designated as Custodians I (predominantly males). Subsequently the enforcement responsibilities under the Equal Pay Act were transferred from the Secretary of Labor to the Equal Employment Opportunity Commission which was substituted as a party.

The Board of Education of Baltimore County (the Board) operates approximately 160 elementary and secondary schools in Baltimore County, Maryland, and for the years in question employed approximately 600 custodians in the classification Custodian I and approximately 500 custodians in the classification Custodian II.

The Investigation

The Secretary's investigation of the Board commenced on May 14, 1973, with the gathering of personnel policies and pay information and a visit by the compliance officer to 3 of the Board's approximately 160 school sites. At a conference held on June 18, 1973, the Board's representatives were informed that violations of the Equal Pay Act were found and "future compliance" was requested. At the request of the Board, 3 additional school sites were examined in June and July of 1973. Following the second

investigation, the Board was informed at a conference on July 13, 1973, that no violation existed during the summer but that a violation existed during the regular school year. Again, only future compliance was sought and no claim was made for back wages. In light of the fact that the compliance officer had found no violation to exist during the period of his latest examination, the Board requested that a more thorough investigation be performed at its school sites when the schools resumed their regular session. Stating that further investigation would not be fruitful, the compliance officer declined to investigate additional locations.

Notwithstanding the declaration that additional investigation would not be fruitful, the compliance officer, in fact, examined 6 additional schools from February to May 1974 and an additional 5 schools in October/November 1974, thus doubling and then tripling the scope of the original investigation. Despite the repeated requests of the Board for a more thorough investigation, the Board was not informed of the results of this more expansive investigation.

As required by § 53b01 of the Field Operations Handbook, no "final conference" was held at the conclusion of the "fact finding phase" of the investigation. And, contrary to the requirements of § 53b01, the Board was not informed of the results of the investigation; no attempt was made to ascertain the reasons for any violations; and no attempt was made to obtain an agreement for future compliance.

Institution of Suit

On March 21, 1975, twenty months after the Board's last request for additional investigation, the Regional Solicitor informed the Board that the investigation had been completed. As a result of a conference with a representative of the Regional Solicitor, on July 16, 1975, the Board

offered to come into voluntary compliance by eliminating existing wage differentials in exchange for the Secretary's foregoing suit for back wages. No response was made to the Board's proposal until March 5, 1976, when a conference was held between representatives of the Board and the Regional Solicitor. At this conference, the Board informed the Regional Solicitor that in November of 1975 the Board had taken the necessary action to eliminate the existing pay differentials between its classes of custodians at a cost of $270,000, which action would become effective on July 1, 1976, the start of its next fiscal year. The Board again requested that the Department forego its demand for back wages in light of its having obtained voluntary compliance. The Board's request was rejected by the Regional Solicitor and this action was instituted on May 7, 1976.

The institution of suit to recover restitution in the form of back wages contravenes the express terms of the Secretary's Civil Injunction Policy which provides that ". . . the Division will use the remedy of an injunction only as a means of securing compliance when voluntary compliance has been refused". The policy further provides that a complaint will not be filed if an employer has come into compliance without the necessity of suit "even though restitution has not been paid . . ."

The Rulings Below

Trial before United States District Judge Frank A. Kaufman, at Baltimore, concluded on March 2, 1978. In a memorandum opinion dated September 28, 1978, the District Court found that although it would have been the better practice for the compliance officer to have reiterated his conclusions to the Board upon completion of the more expansive investigation, "any additional 'final conference' in 1974 would have almost surely been quite perfunctory." The Court further ruled that even assuming that a "final

conference" should have been held after the 1974 visits, the Board has suffered no prejudice "other perhaps than the expense of litigating a possibly unnecessary lawsuit".

With respect to the failure of the Department to adhere to its Civil Injunction Policy and not institute litigation where compliance has been achieved short of suit, the District Court was of the view that the policy was "not designed, at least primarily, to protect the employer, that it was not a published regulation, and that there was apparently no detrimental reliance by the Board upon the obsolete passage . . ."

The judgment of the District Court required the Board to pay to its custodial employees back wages in the amount of $578,000.

The findings of the trial judge were adopted and carried forward in the opinion of the Court of Appeals with no further analysis or elaboration.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the opinion of the Court of Appeals is in conflict with the applicable decisions of this Court.

In a line of cases springing from *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954), the principle has emerged that an agency of the government must scrupulously observe rules, regulations, or procedures which it has established; otherwise, its action cannot stand and courts will strike it down. *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968 (1959) *Yellin v. United States*, 374 U.S. 109, 83 S. Ct. 1828 (1963); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969).

The policies and procedures under consideration here were published by the Department of Labor in a Field Operations Handbook. The Equal Pay Act contains no grant of rule-making authority as a result of which the Secretary has no formally adopted regulations implementing the Act.

It is of no consequence that the procedures in question were not promulgated in something formally labelled a "Regulation" or adopted with strict regard to the Administrative Procedure Act or that the internal procedures are possibly more rigorous than otherwise would be required. The purpose of the "Accardi doctrine" is "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures". *Morton v. Ruiz,* 415 U.S. 199, 94 S. Ct. 1055 (1974); *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. 968 (1959); *United States v. Heffner,* 420 F.2d 809 (4th Cir. 1969).

That portion of the regulations dealing with the holding of a "final conference" not only serves as an internal guideline for compliance officers, but it also confers important procedural benefits upon the employer under investigation.

Had § 53b01 been followed in this case, the Board would have been apprised of the nature and results of the investigation actually undertaken rather than having to respond to the Department's demands with but one-third of the facts available. As a result of the Department's failure to secure the reasons for any violations and its failure to attempt to obtain an agreement to comply, the Board was denied the opportunity to present the results of its own investigation and to persuade the compliance officer that no violation existed. In essence, the provisions of § 53b01 grant unto the employer the right to be given notice of the violation and an opportunity to be heard — the essential elements of procedural due process. It may be

that the Board would not have been able to persuade the compliance officer that the working conditions that justified a difference in wages in the summertime prevailed throughout the entire year and that there was no violation. But as in *Accardi, supra,* and *Yellin, supra,* the Board should have been given the opportunity afforded by the published procedures to try.

With respect to the Department's Civil Injunction Policy set forth in § 81b03 of the Field Operations Handbook, it seems clear that the policy grants a substantive exemption to those employers who change their payroll practices so as to come into compliance without the necessity of suit being filed. The policy may indeed set out a guideline for the internal guidance of the agency with respect to the institution of litigation and the policy may reflect a desire to conserve government resources, but it is clear that there is an enormous benefit conferred upon the employer by exempting it from burdensome litigation and back wage liability. Here, where the litigation undertaken produced a transcript of proceedings of approximately 4,000 pages and a back wage liability of approximately $578,000, the prejudice resulting from the Department's failure to follow its own policy with respect to not instituting civil action after voluntary compliance had been achieved is manifest. Since suit was filed contrary to the Department's own policy such action should not be allowed to stand.

The departure by the Department from its published procedures was arbitrary and denied the Board the fundamental fairness implicit in consistent agency action. Accordingly, the suit instituted in violation of the Department's policies should not be allowed to stand.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
for the Fourth Circuit

No. 78-1901

Equal Employment Opportunity Commission,
Appellee,

v.

Board of Education of Baltimore County,
Appellant.

No. 79-1341

Ray Marshall, Secretary of Labor,
United States Department of Labor,
Appellee,

v.

Board of Education of Baltimore County,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

Argued: January 8, 1980 *Decided: February 19, 1980*

Before HALL and PHILLIPS, Circuit Judges; and STAKER, District Judge.*

(J. Carroll Holzer and Joseph Kiel on brief) for Appellant; David N. Adair, Jr., U. S. Dept. of Labor (Marshall H. Harris, Regional Solicitor; Carin Ann Clauss, Solicitor of Labor; Donald S. Shire, Associate Solicitor, Lois G. Williams, U. S. Dept. of Labor on brief) for Appellee.

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* *Robert J. Staker, United States District Judge, Southern District of West Virginia, at Huntington, sitting by designation.*

PER CURIAM:

These two cases, consolidated on appeal, are before us for review of district court adjudications on issues incident to findings by the Secretary of Labor that the Board of Education had violated provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 *et seq.*), relating to sex discrimination in wage payments to the Board's custodial employees. In the one case the district court enjoins the Board from violating the Fair Labor Standards Act and enters judgment against the Board as back wages due the employees concerned. In the other case the district court, balancing the equities, required the Board to pay pre-judgment interest on the back wages.

Primary issues before the district court were (1) whether the Field Operations Handbook of the United States Department of Labor, containing information, directions and instructions for its employees in their investigative and related work, was a composition required to be published and followed, and (2) whether the Board was obligated to pay pre-judgment interest on the back wages found owing to the employees. Upon careful review and consideration of the records, we find that the district court

addressed these issues thoroughly and that his findings and decisions in the two cases are correct. Accordingly, the judgments of the district court are affirmed.

Affirmed.

United States Court of Appeals
for the Fourth Circuit

No. 78-1901

Equal Employment Opportunity Commission,
Appellee,

versus

Board of Education of Baltimore County,
Appellant,

No. 79-1341

Ray Marshall, etc.,
Appellee,

versus

Board of Education of Baltimore County,
Appellant.

Appeals from the United States District Court for the District of Maryland at Baltimore. Frank A. Kaufman, District Judge.

Upon consideration of the motion of the Equal Employment Opportunity Commission for publication of the opinion and the appellant's petition for rehearing,

IT IS ORDERED THAT the motion for publication of the opinion and the petition for rehearing are denied.

Entered at the direction of Judge Hall with the concurrence of Judge Phillips and Judge Staker.

For the Court,

/s/ William K. Slate, II
Clerk.

In The United States District Court
For The District Of Maryland

Civil No. K-76-672

W. J. Usery, Jr.,
Secretary of Labor,
United States Department of Labor

v.

Board of Education of Baltimore County

Filed: September 28, 1978

Jay S. Berke, Regional Counsel, and Karen Kress Weisbord, Attorney, United States Department of Labor, Philadelphia, Pennsylvania; and Catherine C. Blake, Assistant United States Attorney, Baltimore, Maryland, for Plaintiff.

J. Carroll Holzer, County Solicitor, and Joseph Kiel, Assistant County Solicitor, Baltimore, Maryland, for Defendant.

KAUFMAN, DISTRICT JUDGE.

The Secretary of Labor (plaintiff) alleges that the Board of Education of Baltimore County (defendant) violated the Equal Pay Act[1] ("Act") by paying female custodial workers

[1] 29 U.S.C. §§ 206(d); 215(a)(2). The Equal Pay Act of 1963 is part of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*

in its schools a lower wage than male custodial workers performing substantially equal work.

The Board is responsible for the operation of approximately 160 elementary and secondary schools in Baltimore County. In connection therewith the Board establishes educational policies, prescribes rules and regulations for the conduct and management of the county school system, issues policy guidelines, purchases supplies, handles payroll and bookkeeping functions, fixes compensation of all employees subject to funding by the Baltimore County Executive and County Council, and assigns all personnel.

The Board concedes that its activities were performed through unified operation and control and are deemed to be for a common business purpose within section 3(r) of the Fair Labor Standards Act. The Board also concedes that the school system is a "single establishment" within the meaning of the Equal Pay Act.[2]

From 1964 to 1976, the Board utilized a job classification system under which all janitorial employees were categorized as Custodians I or Custodians II[3] Custodians I, nearly all of whom were male,[4] received $ .25 more per hour than Custodians II, most of whom were female.[5] The separate

[2] 29 U.S.C. § 203(r).

[3] There were originally three (3) levels of Custodial personnel. This was changed to the present two (2) levels in 1964 (Mitchell, Tr. at 778-79).

[4] The break down of all full-time Custodians I, by year, was as follows:

1972 558 males, 1 female
1973 575 males, no females
1974 573 males, 3 females
1975 571 males, 2 females

(Legum, Tr. at 621-24).

[5] The break down of all full-time Custodians II, by year, was as follows:

1972 462 females, 62 males
1973 467 females, 63 males
1974 472 females, 54 males
1975 456 females, 23 males

(Legum, Tr. at 621-24).

classifications and the wage differentials were eliminated by the Board in July, 1976, shortly after this suit was filed. The Board contends that the tasks performed by the two categories of custodians were significantly different and unequal. The Board also asserts that the Secretary is estopped from pursuing relief in this case because of the manner in which the federal agency conducted its investigation of the Baltimore County schools.

The Secretary seeks a permanent injunction enjoining the Board from violating the Act and the payment of back wages to the Board's female employees for school months during the period from May 7, 1974 through July 1, 1976, with interest, at the rate of six percent per annum.

Prior to trial, the parties took depositions *de bene esse* of 39 custodial employees. Those depositions have been admitted into evidence and are part of the record. In a non-jury trial held during the week of February 27, 1978, 11 additional custodians, certain Board of Education officials, a Department of Labor investigator assigned to the case, and several expert witnesses, testified.

Jurisdiction exists pursuant to section 17 of the Fair Labor Standards Act, 29 U.S.C. § 217.

I — AGENCY ESTOPPEL DEFENSE

Defendant argues that plaintiff is estopped from prosecuting this case because of alleged failure by the Department to follow its own regulations and procedures. Defendant relies heavily on the Department of Labor's Field Operations Handbook (FOH). The estoppel defense has two prongs:

(1) Contrary to Section 53b01 of the FOH, the Labor Department's compliance officer failed to conduct a "final conference" to inform the Board of the results of his investigation and to attempt to obtain future compliance; and

(2) Institution of this suit for back wages and injunctive relief after the Board had commenced compliance with the Act violated the Department's policy as stated in section 81b03 of the FOH.

In response, the Secretary contends that the evidence does not support those estoppel contentions and that, in any event, neither estoppel defense is legally viable.

A. The Investigation

In May 1973, Gary Legum, Compliance Officer of the Wage and Hour Division of the Department of Labor, began an investigation into the employment practices of the Board. Legum first contacted Thomas Regan, a specialist in the Board's personnel department, and asked Regan for information regarding the Board's personnel and pay policies. After visiting three of the Board's 160 schools and talking with various employees, Legum again met with Regan and at that time informed him that the Board was violating the Equal Pay Act with respect to some of its custodial employees. Regan requested that Legum put his findings in writing. In a letter dated May 30, 1973, Legum wrote Regan that the lower-paid female custodians were doing work substantially equal to that of the higher-paid male custodians.[6]

[6] Legum wrote in part:

> In response to your request of May 25, 1973 outlining the determinations of violation from the Wage and Hour investigation of the Board of Education of Baltimore, County, the following practices have been found to be contrary to * * * the Equal Pay Act.
>
> * * * * * *
>
> Violations of the Equal Pay Act were found with respect to female custodians (Custodian II) as compared with male custodians (Custodian I). These employees were found to be performing work requiring substantially equal skill, effort and responsibility. It is noted that the entire Custodian I work force is male and Custodian II is 90 percent female.
>
> An early reply with regard to future compliance as to the above items would be appreciated.

Subsequently, Legum met on June 18, 1978, with Dr. Joshua R. Wheeler, Superintendent,[7] Dr. Robert Y. Dubel, the Deputy Superintendent, and other Board representatives to attempt to settle their differences. At the meeting Wheeler said that he felt the wages of the female custodians should be increased but that he did not believe their work to be equal to that of the male custodians. Wheeler also asserted that Legum had not visited a sufficient number of schools to obtain an accurate picture of the Board's personnel policies.[8] He asked that Legum expand his investigation to include other schools.

After consulting with his supervisor, Legum visited three more schools during June and July, 1973. At trial,

[7] Dr. Wheelr was Superintendent until June 30, 1976, after which Deputy Superintendent Dubel assumed the superintendent's post.

[8] Wheeler incorporated those views in a letter dated June 16, 1973 addressed to Legum which read, in pertinent part:

> I have your letter of May 30, 1973 in which you have suggested that certain employment and personnel practices may be contrary to * * * the Equal Pay Act.
>
> In response we submit the following:
>
> * * * * * *
>
> 3. *Classification of Custodial Employees* — In our judgment there is complete justification for two classifications of custodial employees — Custodian I and Custodian II. The job description clearly states that Custodian I's are expected to perform certain more rigorous and hazardous work and in our judgment they are, in fact, doing this on a very substantial basis. We believe it would be a great injustice to our employees to eliminate this pay distinction, thereby granting supervisors the authority to assign this more rigorous and hazardous work on a purely subjective basis. We believe that your visit to less than 2% of our installations does not constitute a reasonable examination of existing conditions, and ask that a more complete examination of this be conducted by your office. I trust we will hear from you regarding this.
>
> If there are other questions regarding our employment practices please do not hesitate to contact me regarding them.

Legum testified that the additional investigation supported his original finding of an Equal Pay Act violation. He met with Board officials a second time on July 13, 1973 and informed them again of his conclusions. He modified his original findings by noting that in some schools male custodians appeared to spend substantial time during the summer on work not comparable to work done by female custodians.[9] However, he reiterated his belief that there existed a violation of the Act in those schools during the school year.[10] Wheeler responded by again requesting a

[9] The Secretary now contends that Legum was incorrect in his assessment that summer work at some schools might not be equal. Although the Secretary presently argues that the Board was in violation of the Act during the summer months as well as the school term, the Secretary is seeking back wages in this case only for work performed during the school term.

[10] Legum restated his findings in a letter to Wheeler dated July 18, 1973:

> In accordance with our conversation in the meeting of July 13, 1973, the following steps are necessary for the Baltimore County school system to come into compliance with the Equal Pay Act.
>
> During the time when school is in session all wage differentials between males in the Custodian I classification and the females in the Custodian II classification must be eliminated in those schools that employ both classifications of employees. During the summer vacation all wage differentials between the males and females in the Custodian I and II classifications respectively must be eliminated where comparable jobs are being performed by males and females. As we discussed, in some schools during the summer males are spending substantial time working on cleaning, waxing and buffing machines and/or working in boilers. If all of the males in a school perform such work they would not be considered to be performing comparable work to the females and therefore, in such locations no equal pay violation would exist in the summer. This would not allow, however, for a year round wage differential, only a differential during the summer when comparable work was not being performed. If any male custodian is not spending substantial amounts of time in the non-comparable work, but rather is cleaning floors, windows, furniture, venetian blinds, etc. he is performing comparable work to that of the females and in those schools a wage

more thorough investigation. He reasoned that, since Legum had found possible differences in work performed by male and female custodians during the summer months as a result of visits to schools during June and July, additional visits during the school term might yield similar conclusions for the rest of the year.[11]

Legum testified that on August 9, 1973 he telephoned Wheeler concerning the latter's request for additional

differential is a violation of the Equal Pay Act and must be eliminated.

In summation, to come into compliance with the Equal Pay Act, Baltimore County schools must eliminate wage differentials between male and female custodians when they perform comparable work in the same school. Comparable work is being performed during the school year at all schools and is being performed at some, if not all locations, during the summer.

[11] Thus, on July 30, 1973, Wheeler wrote to Legum:

I am writing in response to your letter of July 18, 1973 in which you state that, in your opinion, there are certain actions which the Board of Education of Baltimore County should take "to come into compliance with the Equal Pay Act."

At our conference of June 18, 1973, we expressed the opinion that your examination of job performances by custodians in three schools represented an inadequate sampling of our job assignments and performances for Custodians I and II. You agreed at that time to visit additional schools before making your final recommendations. Your letter of July 18, 1973 apparently reflects your observations from this second series of visits. You have concluded the following: "If all of the males in a school perform such work they would not be considered to be performing comparable work to the females, and, therefore, in such locations no equal pay violation would exist in the summer. This would not allow, however, for a year around wage differential, only a differential during the summer when comparable work was not being performed."

It appears that in conceding differences in work performances produced by Custodians I and II during the summer months, you have moved in the direction of approving our method of classifying these jobs. You conclude, however, that the job performances are substantially the same during the approximately nine and one-half months each

investigation,[12] and informed the superintendent that the investigation was "inconclusive" as to work performed during the summer months. However, Legum stated that Equal Pay Act violations existed during the school term and that additional investigation would not be fruitful. According to Legum, he warned Wheeler that if the Board continued to refuse to comply, Legum would submit the file to his superiors for potential ligitation.

Legum in fact did refer the file to the Solicitor of Labor for potential litigation. The Solicitor's office returned the file to Legum with instructions to investigate additional schools. Legum then visited six more schools during February — May 1974, and five schools during October — November, 1974.

During his 1974 investigation Legum apparently did not contact Wheeler. Rather, he dealt with Donald E. Custer, Supervisor of the Board's office of Building Maintenance and Operations, who prepared a letter of introduction and assisted Legum in gathering information. After the additional fact finding, Legum informed Custer that the Board was still in violation of the Equal Pay Act. According to Legum, Custer indicated that the Board would not alter its

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year that schools are in regular session. Obviously, this conclusion could only be based on your first round of visits to three schools.

Thus, we have come full circle and are exactly where we were on June 18, 1973 when we apparently convinced you that you had made the conclusions contained in your letter of May 30, 1973 on the basis of limited observation and insufficient data. Therefore, we are renewing our request that you conduct a more thorough investigation of this situation during the time of the year about which we still appear to have a difference of opinion, namely, the regular school session.

We are hereby requesting, therefore, that you visit a significant number of additional schools after September 6, 1973 when our pupils are in regular session. We will be pleased to assist you in arranging such visits.

[12] Wheeler testified that he did not remember the telephone conversation, but could not deny that it occurred.

position and would not comply in accordance with Legum's views. Custer testified at trial that he merely stated to Legum that he (Custer) personally did not agree with Legum's findings. Custer seemingly did not have any express authority from the Superintendent's office to state the Board's position.[13] In fact, Custer did not apprise the superintendent's office of Legum's visit or of the compliance officer's conclusions.

Apparently, after the August 9, 1973 telephone conversation between Legum and Wheeler, the superintendent's office received no direct word of the Labor Department's investigation until the spring of 1975. In a letter dated March 21, 1975, the Regional Solicitor of Labor wrote the superintendent that the investigation had been completed and that the matter had been referred to the Solicitor's Office "for consideration of appropriate action in accordance with the provisions of law."

Dr. Dubel testified that, prior to receipt of the Solicitor's letter, he and Wheeler had inferred from the Labor Department's apparent silence that the government had either dropped the investigation or had not yet completed its fact-finding.[14]

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[13] At trial Dr. Dubel described Custer's supervisory position as "middle management". He asserted that Custer had no authority to state the Board's position, but only "to cooperate with Mr. Legum in arranging visits to schools". Compliance Officer Legum testified that he had assumed Custer was speaking for the Board of Education.

[14] Dubel testified:

> Q Now, for the period of time between July 30 of 1973 to the time of the communication dated March 21, of '75 was received, where did you feel that the matter lay?
>
> A Well, we made an assumption: One, that the Labor Department had either dropped the case or that they were still conducting investigations and had delayed to pursue the case, and this was well within time frames and well within our past practice in working with the many agencies in the federal government. We find particularly that personnel change and folders seem to go from office to office and quite often we don't hear for many months. We

Dubel and other Board officials then met with a representative of the Regional Solicitor on April 30, 1975 and restated the Board's position that the work was unequal. The result of that meeting was apparently inconclusive. About a year later on March 5, 1976, another meeting was held in Baltimore between Labor Department attorneys and Board officials. At that meeting Wheeler and Dubel agreed to merge the custodial classification and to eliminate the existing pay differentials at a cost of $270,000. Dubel testified that it was at this 1976 meeting that the Board members themselves first learned of the compliance officer's additional 1974 investigations and visits arranged by supervisor Custer. The Board members requested that the Labor Department forego any demand for back wages for the female custodians. In a letter dated March 10, 1976, the Regional Solicitor rejected that request and, two months later, filed the within suit.

B. The Field Operations Handbook

The Board argues that this chronology reveals that the compliance officer failed to comply with procedures set forth in two sections of the Labor Department's Field Operations Handbook (FOH).[15]

First, section 53b01 of the FOH provides a basic outline for a final conference to be held between a compliance officer and an employer upon the compeltion of the fact

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just seem to have no ability sometimes to communicate, and our procedure is as if they are pressing an issue to wait until such time they contact us again, so we simply had to assume that we were relying on this paragraph back in the letter of July 18, 1973 which said that they had found a difference in the summer. We had asked them to do more investigation and we didn't hear from them and we felt it was a reasonable inference that they had either dropped the thing or had not finished the investigation.

Tr. 857-58.

[15] The parties have stipulated that the Field Operations Handbook is a publication prepared by the Administrator of the Wage and Hour Division of the Department of Labor and is not an interpretive bulletin.

finding phase of an investigation. At such a conference, the compliance officer is to inform the employer of the results of the investigation, explain the steps necessary for compliance if violations are found, and attempt to obtain an agreement for future compliance.[16]

[16] Section 53b01 reads in full:

Final conference. (a) The following is a basic outline of the final conference to be conducted upon the completion of the fact finding phase of an investigation; this conference shall be held with the employer or his designated representative.

(1) Inform him of the investigation results.

(2) If violations were found, inform him of the steps necessary to comply, and give him any pertinent publications he does not have and which the CO believes he should have, or those he requests. As appropriate, the CO shall explain the laws involved; this should be done without disturbing practices which are not violative, such as payment of OT to employees who may be exempt.

(3) Ascertain the reasons for any violations and obtain an agreement to comply.

(4) If CL violations are found, give the employer a copy of Form J-103. (Note: If current CL violations are disclosed, the employer should be advised promptly without waiting for the final conference so that corrective steps can be taken immediately, such as transfer of the minor to permissible work.)

(5) If within the authority of the CO, negotiate payment of Bd. (except in potential litigation cases as set out in FOH 80a).

(6) If there are questions which the CO cannot answer, or if for any reason the investigation is being suspended or there will be a delay, the employer should be informed to the extent possible how to correct any known violations with and of the reasons for the delay.

(7) Inform those employers covered by the ADE, including those to be covered in the near future, of the Act's provisions and furnish the employer with the appropriate publications.

In any case where an investigation cannot be brought to a conference within a reasonable time, the CO should advise the complainants, of the delay and of their rights under Sec 16(b). Whether this has been done shall be noted in the narrative, if one has or in the case diary otherwise.

Another section of the FOH instructs the compliance officer to inform the employer of the "final conference" at their initial interview. Section 52a09 states in part:

> *Initial employer interview.* (a) At his first interview with the employer (or his designated representative) the CO shall:
>
> * * * * * *
>
> (2) outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews, and the final conference with the employer or his designated representative to discuss the investigation findings;

The Board concedes that Compliance Officer Legum substantially followed the directives of the FOH with respect to his 1973 investigation of six schools. However, it asserts that he neglected to hold any "final conference" or even to communicate with the Board following the 1974 investigation of eleven additional schools. The Board maintains that Custer, who was Legum's contact in the school system during the 1974 investigation, had no authority to speak for the Board. Thus, defendant reasons, Legum's conversations with Custer as the supervisor of building maintenance and operations did not: (1) apprise the Board of the further investigation and its results, (2) advise defendant of the steps needed for compliance, or (3) constitute an attempt to obtain future compliance. The Board argues that its position regarding future compliance might have changed if it had been informed that Legum's further investigation reinforced his original conclusion.

In response, the Secretary maintains that the fact finding phase of his investigation ended in the summer of 1973. He urges that Legum's meeting with Board officials on July 13, 1973 at which the compliance officer stated his conclusions and delineated the steps necessary for compliance, along with his confirmatory telephone call to Wheeler, constituted the "final conference" described in the FOH. According to the Secretary, Legum's later visits to the school system in 1974 were for the purpose of

gathering data for the Regional Solicitor's Office, to whom he had already referred the file.

Independently of the above, the defendant relies upon section 81b03, which states that if an employer alters its payroll practices to come into compliance, "ordinarily a complaint for a civil action will not be filed."[17] According to the FOH, an exception will be made to that policy if, despite current compliance by the employer, future compliance with the Act cannot reasonably be anticipated. At trial, Legum testified that he had no reason to doubt that, after the Board had eliminated the pay differential between categories of custodians, it would remain in compliance with the Act. The Board therefore contends that the filing of this suit was contrary to the Department of Labor's policy as stated in the FOH.

The plaintiff answers that section 81b03 was issued in December, 1955, when the Secretary did not have the power — as he does now — to seek back wages in an action under section 17 of the FLSA.[18] While the Secretary

[17] That section reads, in relevant part:

81b03 Civil injunction policy. (a) As a general rule, the Division will use the remedy of an injunction only as a means of securing compliance when voluntary compliance, has been refused. Whenever an employer refuses to come into compliance, the investigation shall be prepared for civil action.

(b) If employer, either on his own initiative or as a result of conferences with respresentatives of the Division or of the Office of the Solicitor, changes his payroll practices so as to come into compliance with the FLSA without the necessity of suit, ordinarily a complaint for civil action will not be filed. This policy will be followed even though restitution has not been paid, and in child labor cases where no wilfulness is involved. However, an exception to the general rule will be made and suit filed, despite current compliance, if future compliance cannot be reasonably anticipated, because of the nature of the violations, prior investigation history, and so forth.

[18] Section 17 was amended in 1961 to permit the Secretary of Labor to seek back wages as well as prospective injunctive relief in actions brought under section 17. *See* Pub. L. No. 87-30 *amending* 29 U.S.C. § 217.

concedes that section 81b03 still appears in the FOH, he denies that it represents the current policy of the Department of Labor.

C. *Accardi* Doctrine

The Board bases its defense on the principle that an agency is bound to follow its own rules and regulations. That principle was enunciated by the Supreme Court in United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), and elaborated upon by the Fourth Circuit in United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

In *Accardi*, an alien, admittedly deportable, brought a habeas corpus action attacking the validity of the denial of his application for suspension of deportation. He claimed that his application to the Board of Immigration Appeals had been prejudged because, prior to the Board's decision, the Attorney General had included the alien on a confidential list of "unsavory characters" (at 262) whom he wished to deport. The question before the Supreme Court was whether the alleged conduct of the Attorney General deprived the alien of any rights guaranteed him by statute or by regulation.

Mr. Justice Clark, writing for a majority of five, first described (at 265-67) certain regulations relevant to the case:

> Regulations with the force and effect of law supplement the bare bones of [the Immigration and Nationality Act]. The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation.
>
> Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General — hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: "In considering and and determing . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power

> conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases reviewed by the Attorney General. . . ." 8 CFR § 90.3 (c) (1949). See 8 CFR § 6.1(d)(1) (Rev. 1952).
>
> * * * * * *
>
> The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's.
>
> And if the word "discretion" means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. * * *

Mr. Justice Clark concluded that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267. The Court thus held that if the petitioner could prove his allegations that the Board had failed to exercise its discretion under the regulations, he would be entitled to a new hearing before the Board without the burden of the previous proscription by the Attorney General's list.

The Supreme Court subsequently applied the *Accardi* doctrine to invalidate discharges of federal employees when safeguards required by agency regulations were not provided. *See* Vitarelli v. Seaton, 359 U.S. 535 (1959) (Department of Interior was bound to provide hearing with procedural safeguards pursuant to a departmental order promulgated by the Secretary relating to discharges on national security grounds); Service v. Dulles, 354 U.S. 363

(1957) (Secretary of State's dismissal of foreign service officer was contrary to the State Department's regulations applicable to loyalty discharges and therefore invalid). The Supreme Court has also reversed a conviction for contempt of the House Committee on Un-American Activities on the basis that the committee violated some of its own procedural rules designed for the protection of its witnesses. Yellin v. United States, 374 U.S. 109 (1963). *See also* 3 Mezines, Stein & Gruff, Administrative Law (1977) § 14.02; Note, *Violations by Agencies of Their Own Regulations,* 87 Harv. L. Rev. 629 (1974).

In United States v. Heffner, 420 F.2d 809 (4th Cir. 1969), Judge Winter applied the *Accardi* doctrine in the context of a criminal prosecution under the Internal Revenue Code. The IRS had issued instructions to its Special Agents regarding interviews with taxpayers during criminal investigations. The agents were instructed to produce their credentials during the initial contact with the taxpayer and to inform him that they were investigating the possibility of criminal tax fraud. The agents were also required to advise a taxpayer of his constitutional rights to remain silent and to retain counsel. The agent who interviewed Heffner failed to comply fully with those instructions because he never warned Heffner of the function of special agents nor did he tell Heffner of his right to retain counsel. Heffner was subsequently indicted and convicted on two counts of tax fraud.

On appeal, the Fourth Circuit reversed Heffner's conviction, holding that "(a) an agency of the government must scrupulously observe rules, regulations, or procedures which it has established." 420 F.2d at 812. In so doing, Judge Winter wrote:

> It is of no significance that the procedures or instructions which the IRS has established are more generous than the Constitution requires.
>
> * * * * * *

Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labeled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep. The Supreme Court in Vitarelli v. Seaton, *supra*, applied it to a Department of the Interior "Order." The Second Circuit has applied it to the Army's "Weekly Bulletin 42," § 4(c) (Oct. 20, 1967). Smith v. Resor, 406 F.2d 141, 143-144 & n. 2, 146 (2 Cir. 1969). The District of Columbia Circuit has applied the doctrine to a FCC "rule" which had not been formally promulgated but which the court found had been established by the FCC's "usual practice" of including the rule in its orders. Sangamon Valley Television Corp. v. United States, 106 U.S.App.D.C. 30, 269 F.2d 221, 224-225 & nn. 8 & 9 (1959). See also McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955) (alternative holding). The same court has also applied the doctrine to FCC "Standards." American Broadcasting Co., Inc. v. FCC, 85 U.S.App.D.C. 343, 179 F.2d 437, 442-443 (1949). Finally, in United States ex rel. Brooks v. Clifford, 409 F.2d at 706, this court applied the doctrine to a Department of Defense "Directive."

These cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures. As the Second Circuit said in Hammond v. Lenfest, 398 F.2d at 715, cited with approval in United States ex rel. Brooks v. Clifford, 409 F.2d at 706, departures from an agency's procedures "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." The arbitrary character of such a departure is in no way ameliorated by the fact that the ignored procedure was enunciated as an instruction in a "News Release." The document purports to establish certain procedures which Special Agents are "required" to follow. Undoubtedly, a failure to comply is a rare event within the Intelligence Division—a fact which highlights the apparently inadvertent failure to give the required warnings here. Furthermore, a reversal here would

> not only have the salutary effect of encouraging IRS agents to observe their own procedures, L. Jaffe, Judicial Control of Administrative Action 369 (1965), cited with approval in Smith v. Resor, 406 F.2d at 146, but would assist the IRS in fulfilling its own important stated purpose in requiring that the warnings be given. For the announcement of the instructions was coupled with the justification that they would insure "*uniformity* in protecting the Constitutional rights of all persons."

Id. at 812-13. *See also* United States ex rel. Brooks v. Clifford, 409 F.2d 700, 706 (4th Cir. 1969).

The principles of *Accardi* and *Heffner* have been reiterated on numerous occasions in this circuit[19] and elsewhere.[20]

In some circumstances, agencies have been permitted to depart from their regulations when those regulations were designed to govern internal agency procedures rather than to protect an interest of some other party. *See, e.g.*, American Farm Lines v. Black Ball Freight Service, 397

[19] *See, e.g.*, Mayor and City Council v. Mathews, 562 F.2d 914, 922 & n.6 (4th Cir. 1977) (Winger, J.) (HEW's failure to issue guidelines to help recipients of federal funds comply with Title VI violated agency's regulations and prevented it from taking administrative action against recipients); Morris v. McCaddin, 553 F.2d 866, 870 (4th Cir. 1977) (Hall, J.) (National Guard required to follow its own technician personnel pamphlet in reassigning displaced technicians); Electronic Components Corp. v. NLRB, 546 F.2d 1088, 1090 (4th Cir. 1976) (Widener, J.) (Enforcement of Board order denied because regional director failed to conduct investigation mandated by the Board's rules); United States ex rel. Coates v. Laird, 494 F.2d 709, 711 (4th Cir. 1974) (Russell, J.) (failure of Marine Corps to state reasons why it denied petitioner's application for discharge as a conscientious objector was contrary to administrative regulations and thus invalidated that denial).

[20] *See, e.g.*, Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); (Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

U.S. 532 (1970). In *American Farm Lines*. a motor carrier applied to the Interstate Commerce Commission for temporary operating authority. The ICC was permitted by statute to grant such authority when there is an "immediate and urgent need for service which cannot be met by existing carriers" (at 534 at which the applicable ICC regulation is quoted). Pursuant to its statutory power, the Commission had promulgated rules requiring detailed information in support of applications for a temporary operating authority. Although the motor carrier in *American Farm Lines* did not file as detailed a statement as required by the Commission's rules, the ICC eventually granted the authority. In a suit filed by competing carriers, the Supreme Court upheld the Commission's decision.

In his opinion for five members of the Court, Mr. Justice Douglas focused on a distinction between rules developed for the benefit of an agency and those promulgated for the protection of those who deal with an agency. In that vein, he wrote at 538-39:

> The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems. It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications for temporary authority.
>
> We agree with the Commission that the rules were promulgated for the purpose of providing the "necessary information" for the Commission "to reach an informed and equitable decision" on temporary authority applications. ICC Policy Release of January 23, 1968. The Commission stated that requests for temporary authority would be turned down "if the applications do not *adequately* comply with [the] . . . rules." Ibid. (Emphasis added.) The rules were not

> intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in Vitarelli v. Seaton, 359 U.S. 535, 3 L. Ed. 2d 1012, 79 S. Ct. 968; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. Accardi v. Shaughnessy, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499; Yellin v. United States, 374 U.S. 109, 10 L. Ed. 2d 778, 83 S. Ct. 1828. Thus there is no reason to exempt this case from the general principle that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764. And see NLRB v. Grace Co., 184 F.2d 126, 129; Sun Oil Co. v. FPC, 256 F.2d 233; McKenna v. Seaton, 104 U.S. App. D.C. 50, 259 F.2d 780.

Mr. Justice Douglas concluded that "(u)nlike some rules, the present ones are mere aids to the exercise of the agency's independent discretion."[21] *Id.* at 539.

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[21] That distinction is exemplified by a comparison of the cases of United States v. Leahey, 434 F.2d 7 (1st Cir. 1970) and United States v. Lockyer, 448 F.2d 417 (10th Cir. 1971). In *Leahey*, IRS special agents failed to observe the IRS' announced procedure of warning a taxpayer that they were investigating criminal tax fraud and advising him of his rights to remain silent and to obtain counsel. Judge Coffin held that the IRS was bound by its publicized procedure designed to protect taxpayers and affirmed the district court's suppression of evidence. In *Lockyer*, an IRS agent, contrary to an unpublished provision of an IRS handbook, failed to turn over an investigation to IRS special criminal agents as soon as fraud was suspected. Judge Doyle, distinguishing *Leahey* and (at 421) relying upon and quoting from *Leahey*, held that because the directive was unpublished and designed for internal administration, the taxpayer could not rely upon it to support his motion to suppress evidence. *See* 3 Mezines, Stein & Gruff, Administrative Law (1977) § 14.02 at 14-16 to 14-18).

The Fourth Circuit has also been careful to specify that the principles of *Accardi* and *Heffner* apply only (1) when the agency's regulations are designed to protect the party dealing with the agency and (2) when the agency's departure from those regulations results in prejudice to that party. Judge Winter stated it succinctly in Mayor and City Council v. Mathews, 562 F.2d 914, 922 n.6:

> * * * Federal agencies will be held to strict compliance with their own regulations and rules of procedure, when a failure to observe them results in prejudice to a party they were designed to protect. EEOC v. General Electric Co., 532 F.2d 359, 371 and n.37 (4th Cir. 1976); McCourt v. Hampton, 514 F.2d 1365, 1370 (4th Cir. 1975); United States v. Heffner, 420 F.2d 809, 811-12 (4th Cir. 1970).[22]

D. Analysis

In this case, the Secretary relies on several cases in which the courts have held that the procedures set forth in the Field Operations Handbook and in the Department of Labor's interpretive bulletins are not binding on the Secretary. In Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974), the Secretary instituted an investigation of the defendant and eventually filed suit under the Age Discrimination in Employment Act (ADEA). Although the district court found violations of the ADEA,

[22] *Cf.* United States v. Musgrove, No. 77-1971 (4th Cir. August 7, 1978) (possible failure of government attorneys to comply with Department of Justice guidelines on dual prosecutions would not invalidate conviction); United States v. Walden, 490 F.2d 372, 377 (4th Cir. 1974) (evidence held admissible because, *inter alia*, the violated regulation "expressed a policy for the benefit of the people as a whole, but not only that may fairly be characterized as expressly designed to protect the personal rights of defendants."). See Brennan v. Ace Hardware Corp., 495 F.2d 368 (8th Cir. 1974); Brennan v. Lord & Taylor, Inc., 76 Lab. Cas. ¶ 33,234 (SDNY 1975); *cf.* Marshall v. Krystal Co., 82 Lab. Cas. ¶ 33,603 (E.D. Tenn. 1977) (denying discovery of FOH and other instructional documents issued to compliance officers because such documents "were not intended . . . to have the force and effect of law, and were only guidelines for government personnel.").

it entered judgment for the employer because the Secretary had failed to comply with the statutory mandate to seek voluntary compliance through informal conciliation prior to bringing suit. The Eight Circuit affirmed, holding that two personal meetings and one telephone call by the Secretary's compliance officer did not fulfill the statutory directive. However, in the course of so doing, Judge Gibson stated that the FOH guidelines for compliance officers did not establish rigid standards to which the Secretary would be held. Specifically, Judge Gibson wrote (at 376):

> * * * Stated in other words, does a violation of the handbook provisions constitute a *per se* violation of the Act concerning concilation attempts? We generally agree with the Secretary that "[c]onciliation is notably an assignment to be played by ear" for "it requires flexibility and responsiveness to the attitudes of the other participants and to the developing positions taken by them in conversations." In this regard, courts would be unwise to hold the Secretary to rigid positions announced in the handbook as guidelines for the compliance officers. Handbooks should be ideally written to allow for far-reaching guidelines to implement enacted provisions. In short, there should be a measure of safety written into the procedures to be followed. Courts would also lack prudence to dictate to the Secretary exactly how to perform his duties, which are expressly within the expertise of the Secretary and his department. Our decision affirms the conclusions reached by the District Court, not because the conciliation officer failed to abide by the rules of the handbook, but rather, we think, the statute itself required at least the performance of the affirmative actions by the Secretary to eliminate discriminatory practices and effect voluntary compliance through conciliation and persuasion that were decribed herein, but not attempted in this case.

The Government correctly argues that the handbooks cannot have the force or effect of regulations that are binding upon the Secretary. These handbooks are very similar to the handbooks in Hawkins v.

> Agriculture Stabilization and Conservation Committee, 149 F. Supp. 681 (S. D. Tex. 1957), in which the court noted that the handbooks were not published in the Federal Register, were not intended by any government officials to have the force and effect of law, and were only guidelines for government personnel. That rationale applies here. In addition, since the handbook was the joint exhibit of the parties, the Government does not argue on appeal that its admission was prejudicial error.

Judge Gibson did not discuss or distinguish *Accardi* and its progeny such as *Heffner*. He did conclude that the district court did not abuse its discretion in entering judgment for the employer-defendant.[23]

Unlike the ADEA, the Equal Pay Act contains no statutory provision requiring the Secretary to seek voluntary compliance before instituting legal action. However, Judge Gibson's characterization of the FOH voluntary compliance provisions as guidelines rather than enforceable rules appears equally applicable in this case.

In Brennan v. Lord & Taylor, Inc., 76 Lab. Cas. ¶ 33,234 (SDNY 1975), the Secretary brought an action against the defendant for alleged Equal Pay Act violations at three of its department stores. Later the Secretary sought to amend the complaint to add a claim regarding a fourth store. The defendant contended that the Secretary's failure to comply with the conciliation provisions in his own Interpretive Bulletin with respect to the fourth store precluded him from amending the complaint. Judge Knapp

[23] This Court has held that the EEOC is bound by regulations which it has promulgated in furtherance of a statutory directive to seek conciliation. *See* EEOC v. Westvaco Corp., 372 F. Supp. 985, 993-94 (D. Md. 1974) (Blair, J.) (EEOC actions "were bald and unambiguous violations of the plain language of its own rules" and also controverted conciliation provisions of Title VII); EEOC v. Firestone Tire & Rubber Co., 366 F. Supp. 273, (D. Md. 1973) (Miller, J.) (EEOC determination to sue could not stand because it was reached in violation of its own rules. Judge Miller noted (at 276) that one of the EEOC's regulations, "grants an important procedural benefit to the respondent. . . ."

began by stating that, while it was clear that the Secretary had not attempted to conciliate in accordance with his own regulation, 29 C.F.R. § 800.164, it was not clear what weight should be accorded a violation of such agency rules. Since neither the FLSA nor the Equal Pay Act contains any *statutory* conciliation requirement, the regulation purported to hold the Secretary to a higher standard of conduct than the statute. Judge Knapp also noted that 29 C.F.R. § 800.164 was not promulgated pursuant to any rulemaking authority granted in the FLSA and was therefore an "interpretive" rule without the effect of law. By contrast, he wrote, if the regulation were a "legislative" rule promulgated according to a statutory directive, then there would be no doubt that the Secretary was bound by it. *"Given a convincing show of prejudice,* the courts have held administrators to their regulations even in instances where the regulation requires of the agency a higher standard of conduct than the enabling statute . . . [citing *Accardi, Service, Heffner,* and other cases]." *Id.* at 46,935 (emphasis added; footnote omitted). In cases such as *Heffner*, "the courts were faced with a litigant who had or would shortly suffer grievously as a result of an administrative agency's failure to comply with its own established procedures." *Id.* at 46,936.

In *Lord & Taylor*, Judge Knapp found that the only conceivable prejudice suffered by the employer was the inconvenience of defending a lawsuit that could perhaps have been avoided. Such "prejudice" was not as severe as a threatened deportation (*Accardi*) or a criminal conviction (*Heffner*). Judge Knapp thus allowed the Secretary to amend his complaint to include the fourth store.

Under *Ace Hardware* and *Lord & Taylor*, the two provisions of the FOH relied upon by the Board in this case do not have the same force of law as "legislative" rules. However, consistent with *Heffner* and its kin, the Secretary is bound by those provisions if any deviation from them redounds to the prejudice of a party they were designed to protect.

The final conference required by section 53b01 of the FOH appears *designed* at least as much for the benefit of the Secretary as for the benefit of the employer under investigation. At the conference the compliance officer, after informing the employer of the results of the investigation, can attempt to achieve voluntary compliance and thereby relieve the government of the burden of potentially costly litigation.[24] Of course, the employer can also benefit from an opportunity to settle rather than litigate.

In any event, although the investigation that led to the institution and prosecution of the within case was not a model in terms of communication with the employer, the concerns of the "final conference" provision were adequately met. Even ignoring Compliance Officer Legum's contacts with Custer in 1974,[25] the Board's representatives were informed on several occasions both in person and in writing concerning the results of the 1973 investigation and the steps necessary for compliance. Although Dr. Wheeler did not recall the telephone call at trial, he did not directly or specifically contradict Legum's testimony that the compliance officer informed the superintendent by telephone that the investigation was over and the case had been referred to the Solicitor's office. Accordingly, this Court accepts Legum's testimony with regard thereto. The

[24] *See* Van Teslaar v. Bender, 365 F. Supp. 1007, 1009-10 (D. Md. 1973); United States v. Goldstein, 342 F. Supp. 661 (D.D.N.Y. 1972). In *Van Teslaar*, Judge Miller held that a Coast Guard regulation requiring informal notice to a person of a complaint against him was promulgated for the purpose of providing relevant information for the investigating officer and not to confer procedural benefits on individuals. In Goldstein (at 668), Judge Judd concluded that certain pre-indictment conferences provided in IRS regulations "are primarily for the benefit of the United States, to avoid the expenditure of effort on unfounded prosecution, and not for the benefit of defendants."

[25] Under the circumstances of Legum's contacts with the Board, Custer may well have possessed apparent authority to state the Board's position. However, in view of this Court's determination that the contacts between Custer and Legum in 1974 are not critical to the resolution of the Board's *Accardi* defense, that question need not be reached.

1974 investigation, whether characterized as a continuation of the initial fact-finding or as research on behalf of the Solicitor's Office for this suit, did not alter the compliance officer's conclusions. Although it would have been the better practice for the compliance officer to have reiterated his conclusions to the superintendent, any additional "final conference" in 1974 would have almost surely been quite perfunctory.

Even assuming that a "final conference" should have been held after the 1974 visits, as in *Lord & Taylor* the defendant herein has suffered no prejudice other perhaps than the expense of litigating a possibly unnecessary lawsuit. Any relief granted by this Court in this suit would impose no greater burden on the Board than voluntary compliance in 1974. The injunction sought by the Secretary would merely order the defendant to comply with the Equal Pay Act and to continue personnel practices which it has already voluntarily adopted. If the Board had come into compliance in 1974, it would have already paid all or most of the back wages sought in this action. Thus, other than expense of defending this suit, the Board can show no substantial prejudice due to the failure to hold an additional "final conference."

It is also to be noted that even if Legum did not comply with the FOH in this case, no substantial "prophylactic" purpose would be served by dismissing this case on that ground. *Cf* United States v. Walden, 490 F.2d 372 (4th Cir. 1974).[26] In *Walden*, the defendants were convicted of violation of federal firearms statutes partially on the basis of evidence given by several enlisted Marines acting as undercover agents. The investigation controvened an "Instruction" issued by the Secretary of the Navy which prohibited the use of Navy and Marine Corps personnel to enforce local, state, and federal laws. On appeal, the defendants sought to have the convictions reversed on the

[26] *See also* United States v. DeVaughn, 414 F. Supp. 774, (D. Md. 1976), conviction affd. without comment as to the Walden-type issue in a per curiam unpublished opinion, 556 F.2d 575 (4th Cir. 1977).

ground that the evidence gathered by the Marines should have been excluded. The Fourth Circuit affirmed the convictions. Judge Winter observed that the Navy regulation was designed to restrict military involvement in civilian law enforcement — a policy that Congress had expressed in the Posse Comitatus Act with respect to other branches of the service. The violation of the regulation was apparently unintentional. Despite the violation of the regulation, Judge Winter, in the course of holding that a number of considerations counseled against application of the exclusionary rule, wrote (at 377):

> Even though we sustain defendants' convictions, we have no reason to fear that others will be sought or obtained in violation of the Instruction now that we have expressed our view of its cope and effect. Nor is there reason to doubt that the military, now that we have declared the effect of the Instruction, will fail to take steps to provide a mechanism to enforce it.
>
> For all of these reasons, we therefore decline to reverse defendants' convictions or to impose the extraordinary remedy of an exclusionary rule *at this time*. Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent.

In the case at bar there is no indication that Legum intentionally violated the regulation in question, or that violations, intentional or otherwise, of the "final conference" directive are widespread.

The "civil injunction policy" set out in section 81b03 of the FOH states that the government generally will seek an injunction only when an employer has refused voluntary compliance — even when restitution (*i.e.*, back wages) has not been paid. That provision appears more directed toward conservation of government resources than protection or enforcement of any right of employers under investigation. That policy, formulated at a time when the

Secretary only had power to seek *prospective* relief in a section 17 suit,[27] seems antithetical to the remedy of back wages.[28] Adherence to such a policy, while sensible in terms of prospective relief, could effectively diminish the Secretary's statutory power to seek and insure payment of back wages to employees.

In any event, given that section 81b03 of the FOH is not designed, at least primarily, to protect the employer, that it was not a published regulation, and that there was apparently no detrimental reliance by the Board upon the obsolete passage, the Secretary in this instance is not estopped from prosecuting this action due to any deviation from his own regulations. The Court will accordingly proceed to consider the merits of the case.

[27] *See* pp. 13-14, n.18 *supra*.

[28] Such a policy might also impose a penalty on those employers who chose to litigate the validity of their policies under the Equal Pay Act rather than comply voluntarily. An employer who sincerely disputed the Secretary's assessment of equal work and who opted to litigate the matter could face a substantial liability for back wages if the Secretary turned out to be correct. By contrast, a similarly situated employer who consented to alter his personnel practices according to the Secretary's demands would incur no back wage liability. In addition, while such a policy would encourage voluntary compliance, it might also encourage delay. Further, if the Secretary would not generally sue for back wages, the employer might have an incentive to delay voluntary compliance as long as possible.

United States District Court for the District of Maryland

Civil Action

File No. K-76-672

Ray Marshall, Secretary of Labor, United States Department of Labor,
Plaintiff,

v.

Board of Education of Baltimore County,
Defendant.

JUDGMENT

Trial of this action having been held during the week of February 27, 1978 and the Court having fully considered the testimony of the witness, the depositions de bene esse and other exhibits offered in evidence, and having issued its memorandum opinion of September 28, 1978 containing therein the Courts finding of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a), now in conformity with such memorandum opinion it is hereby ORDERED, ADJUDGED, AND DECREED that Defendant its officers, agents, servants, employees, and all persons acting or claiming to act in its behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Section 6(d) and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1069, as amended; 29 U.S.C. 201, *et seq.)*, hereinafter called the Act in any of the following manners:

(a) Defendant shall not contrary to Section 6(d)(1) of the Act, discriminate within any establishment, between em-

ployees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(b) The defendant shall not contrary to Section 6(d) (1) of the Act, reduce the wage rate of any employee in order to comply with the provisions of Section 6(d) (1) of the Act.

(c) Defendant having equalized the wage rates of its female custodial employees with the wage rates of its male custodial employees shall cease to withhold amounts owing and interest thereon set forth as due to the employees named in Exhibit A, attached hereto and made a part hereof, which, as found by this Court, have been withheld in villation of Section 6(d) (1) and 6(d) (3) of the Act, up to the date their wage rates were equalized in accordance with the Equal Pay Act.

(d) The defendant is restrained from withholding the payment of the aforesaid backwage and interest compensation to its employees listed in Exhibit A, and is directed to make payment of the said compensation as hereafter specified.

Defendant shall deliver to the Plaintiff on November 24, 1978, a certified check in the amount of $578,214.65. Plaintiff shall distribute the proceeds of the check to the employees involved, or to their estates, if that is necessary, and any sums not distributed to the employees named herein, or to their personal representatives because of inability to locate the proper persons or because of such persons' refusal to accept such sums, shall be deposited with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. 2041 and 2042.

It is FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this action shall be taxed against Defendant.

Dated: 10/25/78.

FRANK A. KAUFMAN,
United States District Judge.

The parties by their undersigned attorneys consent to the form of the Judgment set forth above, however, defendant reserves the right to contest the awarding of prejudgment interest.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of July, 1980, I, Leonard S. Jacobson, a member of the Bar of the Supreme Court of the United States and counsel of record for the Board of Education of Baltimore County, Petitioner herein, served 3 copies of the aforegoing Petition for Writ of Certiorari and Appendix A by mailing the copies in a duly addressed envelope with first class postage prepaid to the following parties:

Solicitor General
Department of Justice
Washington D.C. 20530

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Assistant General Counsel
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